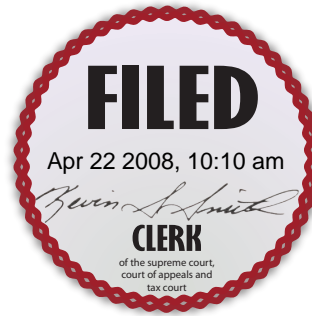


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

HYTHORIS BEARD,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 49A05-0711-CR-615
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Heather Welch, Judge
Cause No.49F09-0603-FD-44531

April 22, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Hythoris Beard appeals from the trial court's order revoking his probation and requiring him to serve the remainder of his previously suspended sentence. Beard raises the sole issue of whether the trial court abused its discretion in ordering Beard to execute the entirety of his previously suspended sentence. Concluding that the trial court acted within its discretion, we affirm.

Facts and Procedural History

On March 10, 2006, the State charged Beard with criminal recklessness, a Class D felony, and carrying a handgun without a license, a Class A misdemeanor. On January 24, 2007, Beard pled guilty to criminal recklessness, and the State dismissed the handgun charge. The trial court sentenced Beard to serve 365 days, 361 of which the trial court suspended to probation. On March 30, 2007, the State filed a motion for sentence modification, requesting that Beard be required to participate in a substance abuse evaluation and comply with recommended treatment, verify his employment search, and make monthly payments for probation fees. On April 4, 2007, the trial court granted this motion.

On June 15, 2007, the State filed a notice of probation violation alleging that Beard failed to report, failed to attend a substance abuse evaluation, failed to report for a drug test, and failed to make payments. On June 20, 2007, the trial court held a hearing and took the matter under advisement. Beard failed to appear at a subsequent hearing and the trial court issued a warrant for Beard's arrest. On August 14, 2007, the trial court held a second hearing on the State's June 15 notice. At this hearing, Beard admitted to the first three allegations,

and the trial court ordered Beard to serve twenty days of his previously suspended sentence followed by continued probation.

On September 6, 2007, the State filed another notice of probation violation, alleging that Beard failed to attend a substance abuse evaluation, failed to submit to a scheduled drug test, and failed to make payments. On September 18, 2007, the trial court held a hearing, at which Beard admitted to the first two allegations. The trial court revoked Beard's probation and ordered him to serve 310 days, the remainder of his previously suspended sentence. Beard now appeals.

Discussion and Decision

I. Standard of Review

A trial court's authority to sentence a defendant following a probation violation is governed by statute.

If the court finds that the person has violated a condition at any time before termination of the period, and the petition to revoke is filed within the probationary period, the court may:

- (1) continue the person on probation, with or without modifying or enlarging the conditions;
- (2) extend the person's probationary period for not more than one (1) year beyond the original probationary period; or
- (3) order execution of all or part of the sentence that was suspended at the time of the initial sentencing.

Ind. Code § 35-38-2-3(g). "Once a trial court has exercised its grace by ordering probation rather than incarceration, the judge should have considerable leeway in deciding how to proceed." Prewitt v. State, 878 N.E.2d 184, 188 (Ind. 2007). Therefore, we do not review a trial court's imposition of a previously suspended sentence under the inappropriateness

standard of Indiana Appellate Rule 7(B). Id. Instead, we review a trial court’s sentencing decision following a probation revocation for an abuse of discretion. Sanders v. State, 825 N.E.2d 952, 956 (Ind. Ct. App. 2005), trans. denied. We will find an abuse of discretion “where the decision is clearly against the logic and effect of the facts and circumstances.” Prewitt, 878 N.E.2d at 188. We will consider the evidence most favorable to the trial court’s decision and will not reweigh the evidence or judge witnesses’ credibility. Sanders, 825 N.E.2d at 954-55.

II. Revocation of Probation

Initially, we point out that the instant probation violation notice was the second notice filed by the State. The first time the trial court found Beard had violated his probation, the trial court specifically advised Beard that it would not tolerate any more violations based on missing drug tests or meetings. The trial court stated, “If you miss one probation meeting, you can be assured, I’m going to violate you and I’m going to give you the remainder of the executed sentence You can’t miss Probation. This is a privilege to be on Probation. . . . There are no excuses other than you do it.” Transcript at 22-23. The trial court issued this warning at the August 14 hearing. The evaluation and drug test Beard failed to attend were scheduled for August 31, just over two weeks later.

At the revocation hearing, Beard admitted that he failed to attend his scheduled substance abuse evaluation and failed to submit to a scheduled drug test. He later testified that he had missed the evaluation and the drug test because he had been helping get his nine-year-old brother ready for school, and his brother’s asthma was acting up that day. Beard

testified that he called his probation officer that morning to tell her he “wasn’t sure if [he] was gonna be able to make it to the evaluation or the [drug test].” Tr. at 43. Beard testified his probation officer told him “everything was okay,” and that they “would take care of it in September when . . . you come to see me.” Id. Beard’s mother also testified at the hearing and stated that she “didn’t know [Beard] had to go [to probation] that day,” and that if she had “known that, he would have been there.” Id. at 41. When the trial court pointed out that Beard had put his brother on the bus at 8:20 in the morning, and questioned him as to why he had not gone to the probation office at that point, Beard claimed that he thought his probation officer had rescheduled both his evaluation and his drug test, and that he did not need to go in that day.

We recognize that Beard has put forth a somewhat plausible explanation for missing his scheduled evaluation and drug test. However, the trial court was not required to accept this explanation. Cf. Fultz v. State, 849 N.E.2d 616, 623 (Ind. Ct. App. 2006) (“It was entirely within the jury’s province to disregard [the defendant’s] self-serving testimony.”), trans. denied; Hunter v. State, 656 N.E.2d 875, 877 (Ind. Ct. App. 1995) (recognizing that the post-conviction trial court was not required to believe the defendant’s testimony), trans. denied. The trial court had the opportunity to observe Beard and judge his credibility. The trial court stated:

And I really think he’s trying to make the Court think that he doesn’t understand what’s going on. And I don’t find that that is reasonable – if he can take care of a 9 year old with asthma and get the 9 year old on the bus, and the mom trusts him to do that. . . . My belief is he simply does not want to do it. He’s been on Probation since January the 24th of ’07, and we’ve not made any progress. That is . . . almost eight months, and we’ve not gotten anywhere.

Tr. at 48.

Therefore, the trial court was faced with a defendant who had previously had his probation revoked for failure to attend multiple meetings and was once again before the court based on his failure to attend. The trial court had previously extended Beard leniency on two occasions by suspending all but four days of his sentence, and then by ordering Beard to execute only twenty days of that sentence. Given the wide discretion we give trial courts in these matters, we cannot say that the trial court abused its discretion in ordering Beard to execute the remainder of his sentence based on this latest failure to abide by the terms of his probation.

Conclusion

We conclude the trial court acted within its discretion in ordering Beard to execute the remainder of his previously suspended sentence.

Affirmed.

BAKER, C.J., and RILEY, J., concur.